

# Criminal Law Symposium



## Hearsay Evidence: Applying *Crawford v Washington*, 541 US 36 (2004), and Common Misunderstandings Regarding Hearsay Evidence

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## Common Misconceptions About Hearsay

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- I. The Theme - Hearsay is less than we think it is.
  - A. What are the reasons for our misconception?
    - 1. We learned the rule as children.
    - 2. The vocabulary of hearsay.
- II. The Vocabulary of Hearsay.
  - A. A typical definition - "Hearsay" is an out-of-court statement offered to prove the truth of the matter asserted.
  - B. The elements of hearsay.
    - 1. Statement.
    - 2. Out-of-court.
    - 3. Offered to prove the truth of the matter asserted.
- III. What is a Statement?
  - A. Some typical statements:
    - 1. "Take 3 pills a day."
    - 2. "Give me the gun."
    - 3. "Where is the whiskey?"
    - 4. "Don't let him get away!"
    - 5. "Get out and don't come back."
  - B. A "statement" is:

MRE 801(a). *Statement*. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

IV. Why is an assertion an element of hearsay?

- A. The purpose of the rule against hearsay - to protect against testimony not subject to cross-examination.
- B. An assertion is the equivalent of testimony.

V. “Implied” Assertions.

- A. What is an “implied” assertion?
- B. An “implied” assertion is a contraction in terms.
- C. The law of “implied” assertion.

"The Neglected Defense to the Hearsay Objection,"  
Michigan Bar Journal, November, 1984 (reprinted in The Advocate [Ohio  
State Bar Journal], March 1985)

"Hearsay: The Rest of the Definition,"  
Michigan Bar Journal, January 1992

*People v Alphonzo Jones* (on remand), 228 Mich App 191; 579 N.W.  
2d 82 (1998).

VI. The “Out-of-Court” Element of Hearsay.

MRE 801(c). *Hearsay*. “Hearsay is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to probe the truth of the matter asserted.

- A. Hearsay is hearsay even when the declarant is on the witness stand.

*People v Jenkins*, 450 Mich 249 (1995).  
*People v Malone*, 446 Mich 369 (1994).  
*People v Hallaway*, 389 Mich 265 (1973).  
(*Contra, People v Hyland*, 212 Mich App 701 (1995)).

- B. The rationale of the rule.

*State v Saporen*, 205 Minn 358, 362; 285 NW 898, 901 (1939).

VII. The Third Element of Hearsay; “Offered to prove the truth of the matter asserted.”

A. The matter asserted by whom? The declarant.

B. Specific examples:

1. *Hanson v Johnson*, 161 Minn 229; 201 NW 322 (1924).
2. *Betts v Betts*, 3 Wash App 53, 473 P2d 403 (1970).
3. Other examples.
  - (a) Gift.
  - (b) Notice.

VIII. A More Precise Definition of Hearsay.

“Hearsay evidence is testimony in court of a statement made out of court, the statement being offered as an assertion to show the truth of the matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter. *McCormick*, Evidence (2d ed) § 246, p. 584.”

*People v Jones*, 48 Mich App 102, 106 (1973).

**Applying *Crawford v Washington*, 541 US 36, 124 SCt 1354, 158 LEd 2004**

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I. The specific holding of *Crawford*:

A tape- recorded statement given to the police by a witness (defendant's wife), admitted in support of defendant's conviction of assault, violated the defendant's right to be "confronted by the witnesses against him" under the Sixth Amendment.

II. So why the fuss?

A. The court overruled the confrontation test (but not the result) of *Ohio v Roberts*, 448 US 56, 100 SCt 2531, 65 LEd2d 597 (1980), which had said that evidence must fall within "a firmly rooted hearsay exception," or bear "particularized guarantees of trustworthiness."

B. "Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.'" (p. 25-26. Emphasis supplied).

C. The Supreme Court cited *People v Schutte*, 240 Mich App 713, (2000) as one of a number of cases misapplying the Confrontation Clause. *Schutte* had approved the admission of an inculpatory statement by a non-testifying co-defendant as a "statement against interest" under MRE 804(B)(3).

D. The new test.

"Where testimonial evidence is at issue . . . the confrontation clause of the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." (p. 33).

III. What is "testimonial" evidence?

A. "We leave for another day any effort to spell out a comprehensive of 'testimonial.'"

But the court cites Webster, an American Dictionary of the English Language (1828):

"Testimony," in turn, is typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" (p. 15).

B. At a minimum, however,” testimonial” evidence includes: (p. 16).

1. Ex parte testimony at a preliminary hearing.
2. Testimony before a grand jury.
3. Testimony at a prior trial.
4. Police interrogations.
5. What about statements of a child victim to an investigating police officer?  
  
Identified as questionable under Footnote 8 of *Crawford*. See *White v Illinois*, 502 US 346, 112 Sct 736, 116 LEd2d 848 (1992).
6. What about MRE 803(A): Child’s Statement about Sexual Act.

IV. What testimonial statements will survive the new test?

- A. Testimonial statements offered for purposes other than establishing the truth of the matter asserted. See *Tennessee v Street*, 471 US 409, 105 Sct 2078, 85 LEd2d 425 (1985). (Footnote 9, *Crawford*.)
- B. Prior statements of a declarant who appears for cross examination at trial. See *California v Green*, 399 US 149, 90 Sct, 1930, 26 LEd2d 489 (1970). (Fn. 9) Compare *People v Jenkins*, 450 Mich 249 (1995).
- C. Forfeiture by wrongdoing: (p. 26).

**FRE 804. HEARSAY EXCEPTIONS; DECLARANT UNAVAILABLE**

(6) *Forfeiture by wrongdoing*. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

**MRE 804. HEARSAY EXCEPTIONS; DECLARANT UNAVAILABLE**

(6) *Statement by declarant made unavailable by opponent*. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

D. Dying declarations?

A likely survivor, according to Footnote 6 of *Crawford*.

E. Spontaneous declarations? (See MRE 803(2), “Excited Utterance.”)

A possible candidate for admissibility, under Footnote 8 of *Crawford*.

**Reported Michigan Cases Applying Crawford v Washington, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).**

**People v Shepherd, 472 Mich 343, 346-347 (2005).**

The Michigan Supreme Court reversed the decision of the Court of Appeals in People v Shepherd, 263 Mich App 665 (2004), on the grounds that the admission of a guilty plea transcript was harmless beyond a reasonable doubt. The Court noted that, because it found the admission of the guilty plea transcript to be harmless, it was unnecessary for the Court to determine whether the admission of the transcript violated the Confrontation Clause of the Sixth Amendment.

**People v Walker, 265 Mich App 530, 535-538 (2005), lv gtd 472 Mich 928 (2005).**

Domestic abuse victim's statements made to police apparently after a two-hour delay were excited utterances under MRE 803(2) and were not testimonial under Crawford.

**People v Bell (On Second Remand), 264 Mich App 58, 60-63 (2004).**

Statement implicating defendant made by a person during a police interrogation while under arrest was testimonial under Crawford. Constitutional error was not harmless beyond a reasonable doubt and required reversal. Crawford applies retrospectively because the case was pending on appeal when Crawford was decided.

**People v Shepherd, 263 Mich App 665, 668-673 (2004), rev'd on other grounds 472 Mich 343 (2005).**

A guilty plea transcript was held to be testimonial under Crawford. Admission of the guilty plea transcript violated the Confrontation Clause. Admission was not harmless error because it was not clear that defendant would have been found guilty absent the improperly admitted statement.

**People v McPherson, 263 Mich App 124, 132-135 (2004), lv den 472 Mich 882 (2005).**

Under Crawford, a statement made to a police investigator was testimonial in nature. However, because the statement was not admitted for its substance, but for purposes of impeachment, the statement did not violate the Confrontation Clause.

**People v Geno, 261 Mich App 624, 629-631 (2004), lv den 471 Mich 921 (2004).**

Child's statement was not testimonial where it was made to the director of the Children's Assessment Center, who was not a government employee. The Court noted that, even if it were to consider whether the admission violated the Confrontation Clause, it would find no plain, outcome determinative error.